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Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 37.

MARTIN V. B. COE, PETITIONER,

v.

KATHARINE C. COE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF WORCESTER, MASSACHUSETTS.

BRIEF FOR PETITIONER.

SAMUEL PERMAN,
Attorney for Petitioner.

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Of Counsel.

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BRIEF FOR PETITIONER.

Opinions Below.

The first opinion of the Court below in this case is reported in 316 Mass. 423 (R. 612). The final decision is reported in 1946 Mass. Advance Sheets, 1127 (R. 616).

Jurisdiction.

The final judgment of the Court below was entered on October 30, 1946. The petition for a writ of certiorari was filed January 28, 1947, and this Court granted the petition on March 3, 1947. Jurisdiction is invoked under section 237(b) of the Judicial Code, 28 U.S.C. sec. 344(b).

Questions Presented.

1. May the question of the jurisdiction of the Court granting the divorce be relitigated under the full faith and credit clause by the party obtaining it, in view of the fact

that both husband and wife were personally subject to the jurisdiction of the Court, raised issues on the merits and testified in the proceedings?

2. (*a*) Did the Court below err in holding that the evidence supported the finding by the Trial Court that petitioner was not domiciled in the State in which respondent obtained her divorce, and in disregarding a contrary finding based on the pleadings and testimony of both parties made by the Court granting the divorce?

(*b*) Did the Court below disregard the proper criteria and standards of proof with respect to the question of domicil?

3. Apart from the validity of the divorce, are the incidents of the marital relationship, such as support and property rights, subject to relitigation, under article IV, section 1, of the Constitution, when the Court deciding such issues had jurisdiction over the persons of both parties?

4. Does Mass. G.L. (Ter. Ed.) c. 208, sec. 39, as interpreted and applied by the Court below, deprive petitioner of rights guaranteed to him by the full faith and credit clause?

Statute Involved.

"A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth."

G.L. (Ter. Ed.) c. 208, sec. 39.

Statement.

On May 25, 1943, respondent, the former wife of petitioner, filed a petition for contempt in the Probate Court for the County of Worcester, Massachusetts, alleging that she was the wife of petitioner, and that he be adjudged in contempt for failure to comply with an award of support made in that Court on March 25, 1942 (R. 1). Petitioner set up as a bar to the respondent's petition a decree of divorce and property settlement obtained by respondent in Nevada on September 19, 1942 (R. 2). Respondent then filed a petition for modification of the support award, asking for an increase, to which petitioner filed his answer, setting up the Nevada decree and the property settlement contained therein (R. 5, 36). Petitioner also filed a petition for revocation of the support award, based upon the Nevada judgment of divorce and property settlement (R. 7), and a plea in bar, relying thereon.

The Trial Judge dismissed the petition for contempt and the petition for revocation was sustained upon the basis of an exemplified extended record of the Nevada proceedings (R. 580-601). The judge did not permit respondent to introduce evidence pertaining to the lack of jurisdiction of the Nevada Court nor did he permit respondent to make a showing that there had been a violation of Mass. G.L. (Ter. Ed.) c. 208, sec. 39. The Trial Court held the parties were no longer man and wife. Respondent appealed to the Supreme Judicial Court, and the action of the Trial Court was reversed and the case remanded for hearing on the ground that the full faith and credit clause as applied to the present facts did not preclude inquiry into the jurisdiction of the Nevada Court to grant the divorce. The Supreme Judicial Court further held that the fact that respondent was the recipient of the divorce did not estop her from showing that G.L. (Ter. Ed.) c. 208, sec. 39,

which the Court held valid, had been violated. *Coe* v. *Coe*, 316 Mass. 423.

Upon remand of the cause an extensive hearing was held with respect to the jurisdiction of the Nevada Court, the violation of the statute, as well as other matters.

The evidence at the second trial shows that the parties were married in New York City in 1934, and until their separation in 1939 they resided in Worcester, Massachusetts. In October, 1940, petitioner leased an apartment in New York City, where he made his home (R. 234), taking an occasional trip to inspect his Worcester properties (R. 481-482). These properties consisted of two dwelling houses, in one of which petitioner and respondent had lived as man and wife. Most of his business, which consisted of dealing in securities, was transacted in New York, where in 1939 petitioner caused a securities corporation to be formed to facilitate his business (R. 229-230). In New York petitioner was under the care of an ear specialist, who treated him continuously, in an attempt to remedy his defective hearing (R. 230).

On January 13, 1941, respondent instituted proceedings for separate support in Massachusetts, alleging cruelty and desertion. Later respondent filed a libel for divorce alleging cruelty. Petitioner filed a cross-libel also alleging cruelty. Amendments were filed to both libels alleging adultery. A hearing was held in March, 1942. Respondent withdrew her libel for divorce and proceeded on her separate support petition, which was heard together with petitioner's libel for divorce. On March 25, 1942, the Court held for respondent, awarding her a decree permitting her to live apart for justifiable cause and an award for separate maintenance in the sum of $35 weekly. The amount of the award was appealed by respondent to the Supreme Judicial Court, and the amount was sustained by that Court. *Coe* v. *Coe*, 313 Mass. 232.

On June 10, 1942, petitioner, having decided to move from New York City, arrived in Reno, Nevada (R. 114), having been driven there by his secretary, whose mother accompanied them. The secretary and her mother returned to Massachusetts within a few days after their arrival (R. 371). He testified that he intended to make his home in that State for reasons of health (asthma) (R. 245), and to get away from respondent. He was attracted by the liberal tax laws of Nevada (R. 245). He also intended while living in Nevada to obtain a divorce, relying on a cause which occurred in New York City after the March 25, 1942, decree in Massachusetts, intending to reside in Nevada whether he obtained a divorce or not (R. 246-247).

Petitioner filed a complaint for divorce in the District Court for the First Judicial District of the State of Nevada on July 27, 1942, alleging that he was a bona-fide resident of Nevada and basing his claim for divorce upon cruelty and desertion (R. 599-601). Respondent was personally served with notice of the divorce proceeding in Worcester, Massachusetts (R. 43), and, after consultation with local counsel, she went to Nevada at her own expense for the purpose of contesting petitioner's action and to obtain a divorce herself (R. 431). To that end she engaged Nevada counsel, recommended by the local Chamber of Commerce, to which she had applied (R. 433). Respondent had not seen petitioner or been in touch with him from the time of the support proceedings in Massachusetts in March, 1942, until the Nevada hearing on September 19, 1942, except through Nevada counsel for the purpose of the property settlement mentioned below (R. 429). Respondent did not even know petitioner had gone to Reno until service of the citation was made upon her in Worcester (R. 429-430).

Respondent filed a demurrer to petitioner's complaint (R. 496). On September 18, 1942, she filed an answer, raising issues on the merits, admitting petitioner's allega-

tions as to residence (R. 593-594), and a cross-complaint for divorce alleging cruelty. The previous Massachusetts proceedings were not mentioned by respondent. Respondent alleged that the parties had "entered into a written agreement fully and finally settling all property rights of every nature between them, and which said agreement she believes to be fair and reasonable" (R. 594). She prayed for a divorce on the ground of extreme cruelty and asked that the property settlement contract be ratified, adopted and approved by the Nevada Court (R. 594). Under the terms of the property settlement respondent was to receive $7500 in cash immediately, and $35 weekly for support, in consideration of which she released all claims against the estate and property of the petitioner, including all other claims for support (R. 515).

The petitions for divorce were heard in Nevada on September 19, 1942. Both parties were present in court and each was represented by separate counsel. Petitioner testified that he had been present in Nevada from June 10, 1942, until July 27, 1942, and that, with the exception of a few days, he had continued to be physically present in Nevada up to the date of the divorce hearing (R. 484-485). He testified that when he came to Nevada he did so with the intention of making that State his home, and that his intention had remained unchanged (R. 585). He further testified that he had opened a bank account in Reno, that he had a safety-deposit box there, that he had registered his automobile in Nevada and taken out a driver's license (R. 585). His testimony as to residence was fully corroborated by witnesses. Petitioner made his home at a ranch near Reno (R. 584).

Respondent testified to the acts of cruelty and admitted having entered into a property settlement, which respondent requested the Court to approve and adopt (R. 586-587). The Nevada Court found on the evidence that it had

jurisdiction of the petitioner and the respondent and of the subject-matter (R. 588). The Court entered a decree of divorce for respondent and ratified, approved, confirmed and adopted the property settlement contract, ordering each of the parties to comply with its terms (R. 489). Neither party took an appeal from the action of the Nevada Court, and its judgment became final.

Petitioner remarried the day respondent received her divorce, and returned to New York with his wife for the purpose of vacating his apartment, the lease of which was shortly to expire (R. 253). He thereafter went to Worcester, Massachusetts, for the purpose of disposing of the two houses which he owned there. He sold the house petitioner and respondent had lived in in Worcester (R. 254), and rented the other one to a tenant. In May, 1943, petitioner then returned to Nevada with his wife, in order to purchase a house in which to live, and other property there (R. 254-255, 575). He was particularly interested in purchasing and operating the ranch at which he had lived previously and entered into negotiations with a view to acquiring it (R. 255).

Shortly after his return to Nevada, petitioner learned that the contempt proceedings had been started against him in Massachusetts (R. 255), and he was advised by his Nevada counsel to return to Massachusetts and defend that action (R. 257, 575). Petitioner and his wife returned in August, 1943 (R. 334). His testimony was corroborated by the deposition of his Nevada counsel, presently Attorney General of that State. The validity of the divorce and property settlement incident thereto under Nevada law was proved in the same manner (R. 564-579). In answer to a cross-interrogatory propounded by respondent directed to petitioner's Nevada counsel, who was also treated by the parties as an expert in Nevada law, it was pointed out that under Nevada law it is not necessary for both

plaintiff and defendant in a divorce action to have resided in the State. The residence and domicil of either in the State for the requisite period is sufficient (R. 572).

Petitioner was advised by counsel upon his return to Massachusetts that the proceedings brought by respondent were likely to continue over a protracted period of time (R. 257-258). Petitioner therefore caused a corporation owned by him to purchase a house in Worcester for him and his wife to reside in, while the present proceedings continued. The instant case was begun in May, 1943, and has not yet been concluded. Petitioner's counsel deemed it essential that petitioner remain in Massachusetts during the period of litigation.

The Trial Court in Massachusetts labeled most of the testimony of the petitioner false, disregarded completely the depositions of the Nevada counsel, and found that petitioner had never intended to change his Massachusetts domicil, despite his residence in New York and Nevada. The Trial Court did not even purport to deal with the issues presented to it at the outset by petitioner (R. 39, 112), *inter alia*, that the decision of the Nevada Court on the question of its jurisdiction over the subject-matter was conclusive and could not be inquired into in the Massachusetts proceedings under the full faith and credit clause. The Trial Judge also found that the Nevada Court did not have personal jurisdiction over either party. He concluded that the divorce was invalid and was in violation of G.L. (Ter. Ed.) c. 208, sec. 39, for the reason that the cause arose in Massachusetts (R. 45-51). He therefore overruled the plea in bar and dismissed the petition for revocation of the support order. The Trial Judge's conclusions with respect to the invalidity of the Nevada divorce proceedings and the violation of the statute were affirmed on appeal taken by petitioner to the Supreme Judicial Court of Massachusetts.

Specification of Errors to be Urged.

The Court below erred—

1. In failing to hold on the evidence that petitioner was domiciled in Nevada at the time respondent obtained her divorce.

2. In failing to hold that the Nevada Court had jurisdiction over the subject-matter of the action.

3. In failing to find that the Nevada judgment was *res judicata* and entitled to full faith and credit with respect to the domicil of petitioner.

4. In failing to hold that the issue of the jurisdiction of the Nevada Court over the subject-matter was *res judicata.*

5. In failing to find that the Nevada judgment was valid in Nevada.

6. In failing to give full faith and credit to the Nevada judgment of divorce.

7. In disregarding the property settlement made pursuant to Nevada statute and incorporated in the Nevada judgment.

8. In holding that G.L. (Ter. Ed.) c. 208, sec. 39, as applied in this case does not violate the full faith and credit clause of the Federal Constitution.

9. In disregarding the rulings of this Court with respect to the burden of proof on the issue of domicil.

10. In affirming the judgment of the Probate Court for the County of Worcester, Massachusetts.

Summary of Argument.

I.

The divorce proceedings in Nevada took place with both parties personally subject to the jurisdiction of the Nevada Court. The issue of the domicil of petitioner in Nevada

was distinctly and necessarily an issue in the case, an issue raised at the outset by petitioner's complaint in his divorce action, and requiring corroborative proof under Nevada law. Respondent had an opportunity, through an attorney of her own choice, to contest that issue. The Nevada Court entered a decree of divorce for respondent, finding on the evidence that petitioner was domiciled in Nevada. That decision was not appealed from and is final. The full faith and credit clause precludes any re-examination in Massachusetts, in a case involving the same issues and evidence, of a question fully and finally determined in a sister State, including all questions of jurisdiction over person and subject-matter. This follows because the parties submitted to the Nevada Court for its determination the question of its jurisdiction to grant the divorce. Both parties having thus had the opportunity to litigate that question, the matter is not open for re-examination elsewhere.

II.

Petitioner contends that, aside from all questions relating to the finality of the Nevada judgment with respect to its jurisdiction over the subject-matter, the Court below erred in holding that petitioner was not domiciled in Nevada at the time the divorce action was there commenced by him. The evidence clearly demonstrates that petitioner had acquired a home in Nevada, a home to which he again returned after settling his affairs in the East. There was no evidence of consent or collusion between the parties with respect to the Nevada divorce. On the contrary, the record reveals an intense hostility existing between petitioner and respondent, one which did not admit of agreement or prearrangement.

Moreover, it is contended that both the Court below and the Trial Court accorded no weight whatsoever to the presumption of validity with respect to the final decree entered by the Nevada Court. Through the entire trial of the cause below, which involved precisely the same issues as the Nevada proceedings, the burden of demonstrating to the Court his Nevada domicil was placed upon petitioner. The proceedings below are consistent only with a view that a Nevada divorce is invalid unless and until proved otherwise. Needless to say, such a theory is completely at war with the rights created by the full faith and credit clause.

III.

The parties entered into a property settlement contract which was incidental to their separation and a prelude to the divorce proceeding. Such contracts are lawful both in Nevada and in Massachusetts. The property settlement was incorporated in the Nevada divorce decree by a Court which found on evidence presented by both parties that it had jurisdiction. A decree dealing solely with support and property rights amounts to nothing more or less than an ordinary money judgment which may be enforced elsewhere as the obligations thereunder accrue. Such a judgment is entitled to full faith and credit, even assuming that the Court did not on the facts have jurisdiction over the divorce action itself.

IV.

G.L. c. 208, sec. 39, of the Massachusetts statutes, as applied to the facts of this case, purports to create an invalid exception to the full faith and credit clause. It attempts to limit the forum for divorce when one spouse is

domiciled in Massachusetts to Massachusetts Courts by providing in effect for the non-recognition of an otherwise valid decree of divorce obtained at the domicil of the other spouse in a sister State. Furthermore, the statute is completely inconsistent with the principle of finality as to questions of jurisdiction evolved by this Court under the full faith and credit clause.

Argument.

I.

The question of the Nevada Court's jurisdiction over the subject-matter was improperly re-examined below.

In sharp contrast to the *ex parte* judgment of divorce, this case presents a situation in which the divorce under attack was granted with both parties appearing, filing pleadings, personally present before the Court and testifying in the proceedings. See Radin, The Authenticated Full Faith and Credit Clause, 39 Illinois Law Review, 1. Moreover, this case arose on the "civil side of the court." Many of the considerations for the decisions in the *ex parte* cases disappear and problems not hitherto presented arise.

The record of the Nevada divorce proceedings discloses that the petitioner's complaint alleged a proper domicil in Nevada. Respondent's answer admitted the allegation of domicil, and by her cross-complaint she invoked the protection and aid of the Nevada laws. Although domicil was admitted, the Nevada Court, pursuant to Nevada law (Nevada Compiled Laws, 1929, sec. 9467.02, as amended),*

*This section provides that the Court shall require corroboration of the evidence of residence in all civil cases where the jurisdiction of the Court depends upon the residence of one of the parties to the action.

heard testimony from the petitioner and other witnesses with respect to his domicil in that State, on which it could have and did find as a fact that it had jurisdiction over the subject-matter of the action. Respondent was physically present in court and represented by an attorney she voluntarily selected. She not only had a full and complete opportunity to present her contentions of fact and law, but she was physically present in the Nevada Court and might have testified with respect to all issues raised by the petitioner's complaint. She might have set up the Massachusetts Separation Decree as a possible bar. *Harding* v. *Harding,* 198 U.S. 317. However, she chose not to. Instead, she returned to Massachusetts and repudiated the divorce she had just obtained. She sought and was permitted to reopen the issue of petitioner's domicil, which had just been adjudicated. Under these circumstances, to hold that the respondent is entitled to a second day in court involving the same issue and the same evidence militates against and renders meaningless the full faith and credit clause and the purpose of uniformity which it was intended to accomplish.

There are few principles of law so basic in our judicial system as the principles underlying the doctrine of *res judicata.* It is a doctrine with an ancient and respectable heritage common to the State and Federal Courts. See Medina, Conclusiveness of Rulings on Jurisdiction, 31 Columbia Law Review, 238. It is a doctrine founded on strong public policy,* designed to prevent litigation by "piece meal," and to put at rest any issue with respect to which a litigant has had his day in court.

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*"A judgment is properly a bar on principles of public policy because the peace and order of society, the structure of our judicial system, and the principles of government require that a matter once litigated should not again be drawn into question." Freeman, Judgments (5th ed.) 1318. See also *Jeter* v. *Hewitt,* 22 How. 352, at 364.

A substantial body of authority has been long developed by this Court with respect to *res judicata* as applied to non-jurisdictional issues, the classical case probably being that of *Cromwell* v. *County of Sac*, 94 U.S. 351.

It is only, however, within comparatively recent times that the problem of *res judicata* with respect to jurisdictional issues engaged the attention of this Court. An examination of those cases revealed a clear and decisive trend and pattern which, with but a few exceptions not here material, has eliminated the distinctions between jurisdictional and non-jurisdictional issues.

The earliest case to raise the question of application of principles of *res judicata* to jurisdictional issues is that of *Chicago Life Insurance Co.* v. *Cherry*, 244 U.S. 25 (1917), which held that a refusal by Illinois to permit re-examination of a Tennessee judgment for alleged invalidity of service in Tennessee did not violate due process. The law expressed in the *Cherry* case was held applicable to the Federal Courts in the first *Baldwin* case, 283 U.S. 522, and in the second *Baldwin* case, 287 U.S. 156, the full faith and credit clause was placed squarely behind the effect of a judgment as *res judicata*.

That domicil, despite its nebulous and fictional characteristics, was a jurisdictional fact subject to principles of *res judicata* was established by *Davis* v. *Davis*, 305 U.S. 32. In that case the husband filed a complaint for divorce in Virginia. The wife was personally served in the District of Columbia, and she appeared to contest the jurisdiction of the Virginia Court. After hearing, the Court found that the husband was domiciled in Virginia and granted him a divorce decree. The husband then moved in the District of Columbia to set aside a decree of limited divorce previously granted the wife, so that he would no longer have to provide support for the wife. The wife again

attacked the jurisdiction of the Virginia Court to grant the divorce. The Court of Appeals for the District declined to enforce the Virginia decree. This Court reversed, holding that the Virginia Court's finding that the husband was domiciled in that State was binding upon the wife in the District of Columbia under the full faith and credit clause, despite the fact that the participation by the wife was limited to a special appearance.

The subsequent cases of *Stoll* v. *Gottlieb*, 305 U.S. 165; *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, affirmed the application of principles of *res judicata* to jurisdictional issues. In the last-cited case it was stated by this Court (at p. 403):

> ". . . the principles of *res judicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties."

Neither the Trial Court nor the Court below treated with the conclusive effect of the judgment herein involved on the basis of principles of *res judicata*. The attitude of the Court below is clearly demonstrated by the result it accomplished, and its views may be ascertained by an examination of the language employed in the opinions to attain an invalidation of the judgment under consideration.

It was said by the Court below:

> "The circumstances that both parties were temporarily physically in the State of Nevada and before the Court does not alter the fundamental principle that 'jurisdiction to grant a divorce must be upon the domicile of at least one of the parties.' "

There is some suggestion in this conclusion that the language so frequently found in decisions that jurisdiction to grant a divorce is founded on domicil, *Williams, 2d*, 325 U.S. 226, at 229, extends the area of permissible re-examination of divorce judgments. If that were so, no divorce judgment could be final. Yet it is clear that fundamental principles of *res judicata* are as applicable to domicil as a jurisdictional fact as they are to other jurisdictional facts, and that divorce judgments are subject to *res judicata* principles.

The limitation of the full faith and credit clause by the dogma that jurisdiction to grant a valid interstate divorce is founded on domicil is not altered by application of *res judicata* principles. The application of this dogma has hitherto been limited and confined to situations where principles of *res judicata* were not strictly applicable, namely, *ex parte* divorces. The encroachment on the full faith and credit clause permitted in *ex parte* divorces does not indicate an impairment of fundamental conceptions underlying *res judicata*. On the contrary, the trend has been opposed to encroachment on the rule of credit and restricting the permissible areas limiting the application and scope of *res judicata* principles. See Cheatham, Res Judicata and the Full Faith and Credit Clause, 44 Columbia Law Review, 330; Boskey & Braucher, Jurisdiction and Collateral Attack, 40 Columbia Law Review, 1006. A very effective answer is contained in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381. Here it was stated, at page 403:

> "The suggestion that the doctrine of *res judicata* does not apply unless the court rendering the judgment had jurisdiction of the cause is sufficiently answered by *Stoll* v. *Gottlieb*, 305 U. S. 165 and *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66."

The Court below sought to avoid the effect of the application of *res judicata* and the credit clause by distinguishing the *Davis* case on the basis of the contest of the jurisdictional issue there involved. The principle of finality as to jurisdiction over subject-matter is not one that is limited to occasions where there is such a contest. Where a person personally subject to the jurisdiction of the Court is given an opportunity to contest its jurisdiction over the subject-matter and does not do so, he is, nevertheless, barred from raising the same questions again elsewhere in an action between the parties involving the same issues and evidence. This was the principle clearly expressed in the first *Baldwin* case, 283 U.S. 522, where it was said at pages 525-526:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue be bound by the result of the contest, and that matters once tried shall be forever settled as between the parties. *We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud,* be thereafter concluded by the judgment of the tribunal to which he submitted his cause.*" (Emphasis supplied.) (And compare *Stoll* v. *Gottlieb*, 305 U.S. 165; *Heiser* v. *Woodruff*, 327 U.S. 726, 735, 736; *Angel* v. *Bullington*, 67 S. Ct. 657 (1947).)

*The kind of fraud applicable is defined and discussed in *Cohen* v. *Randall*, 137 F. (2d) 441, as being in the nature of coercion, duress or intimidation. Compare *United States* v. *Throckmorton*, 98 U.S. 61. There is not the slightest indication here that the respondent was coerced into submitting herself to the jurisdiction of the Nevada Court or to leave Massachusetts for the purpose of contesting the petitioner's complaint for divorce.

The test determining finality of a jurisdictional issue under *res judicata* principles is opportunity to be heard, not contest of the issue. In *Heiser* v. *Woodruff*, *supra*, an issue of fraud raised by the pleadings but unsupported by evidence was held to have been litigated for the purpose of *res judicata*.

In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, the parties and the Trial Court assumed the validity of a statute giving the Court jurisdiction over municipal debt readjustment without contesting its validity. The statute was later declared unconstitutional in another case. A new case was then brought on the municipal bonds, which had been dealt with in the earlier decisions. This Court held that the judgment rendered pursuant to the statute could not be collaterally attacked for want of jurisdiction over the subject-matter, stating, at page 378:

> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.'"

No reason has been suggested by the Court below to justify the absence of a contest as a persuasive consideration for the abandonment of the claim of credit for the judgment here involved on principles of *res judicata*. No sound reason suggests itself as requiring a contest in order to further the highly desirable result of attaining uniformity

with reference to determinations of status. Certainly any requirement that divorce proceedings must be conducted in the atmosphere of a legal prize ring would add nothing to the dignity of such a divorce, and is not the requirement of the laws of either Nevada or Massachusetts.

Under article IV, section 1, of the Constitution of the United States and the Act of Congress implementing it, 28 U.S.C. sec. 687, each final judgment is entitled to the same faith and credit in other States to which it is given in the State which rendered it. There is no question but that the judgment in the present case is valid and binding on the parties in Nevada. All due process requirements have been met. Respondent may not now collaterally attack the judgment in Nevada on the ground that petitioner was not domiciled in that State. *Confer* v. *District Court*, 49 Nev. 18.

Evidence of Nevada laws and the effect of the decree rendered thereunder was introduced by petitioner in support of his contentions. There was no contrary evidence presented, so that the effect of the judgment is unquestioned.

Respondent did not appeal from the decree or otherwise directly attack it. She not only had full and complete opportunity to contest all jurisdictional issues, but had her day in the Nevada Court. She was the successful party. The issue of domicil was raised by petitioner's complaint and supported by testimony. Such matters are *res judicata*. *Weisheyer* v. *Weisheyer*, 54 Nev. 76. As distinguished from *ex parte* cases where compliance with the purely local laws of the divorce-granting State may operate to deprive the non-appearing spouse of full opportunity to be heard, the effect claimed for the judgment here is one where the judgment has met with every test of "justice and fair dealing." Under these circumstances, the Nevada judgment is one entitled to full faith and credit

in Massachusetts. *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430. See Restatement, Conflicts, sec. 450; *Williams, 1st*, 317 U.S. 287, at 306. Massachusetts, therefore, improperly reopened the question of petitioner's Nevada domicil. Husserl, Some Reflections on Williams v. North Carolina, 32 Virginia Law Review, 555, note 51, at page 568. Peaslee, Ex Parte Divorce, 28 Harvard Law Review, 457, at 472.

Other State Courts, when dealing with the extra-territorial effect to be given to sister State judgments of divorce, have virtually unanimously recognized and given effect to *res judicata* principles, and, on circumstances even less persuasive than those in this case, have recognized the validity of the divorce. *Scafidi* v. *Scafidi*, 57 N.Y.S. (2d) 273. *Cole* v. *Cole*, 96 N.J. Eq. 206. *Teidemann* v. *Teidemann*, 158 N.Y.S. 851; aff'd 225 N.Y. 709 (demurrer filed to complaint for divorce). *Glaser* v. *Glaser*, 276 N.Y. 296 (appearance). *Bloedorn* v. *Bloedorn*, 76 F. (2d) 812 (App. D.C.) (personal appearance and litigation on demurrer). *Norris* v. *Norris*, 200 Minn. 246. See note (1941), 54 Harvard Law Review, 1060. In *Senor* v. *Senor*, 65 N.Y.S. (2d) 603 (1946), the plaintiff sought to repudiate a divorce decree and property settlement contract she obtained in Nevada, the husband having appeared in the Nevada proceeding. The New York Court held the Nevada decree final, and not subject to collateral attack.

The same conclusion was raised by the New York Court involving collateral attack on an Idaho judgment of divorce and property settlement agreement in *Miller* v. *Miller*, 65 N.Y.S. (2d) 696, where it was stated:

> "It has been repeatedly held in our courts that when both parties voluntarily appear in a foreign court and the jurisdictional facts are there adjudicated by that court, and that court has heard and determined the

issues, our courts will not permit the jurisdiction of that court to be collaterally attacked here [cases cited]."

There is some suggestion by the Court below that the interests of Massachusetts had been violated. The "legitimate interest" of a State in the marital status of its domiciliaries is, of course, a factor in determining the interstate validity of a judgment. It is submitted, however, that the claim of State interests must be viewed in the light of the greater Federal interest secured by the full faith and credit clause to promote uniformity in its social as well as economic aspects. The precise nature of the State interests here involved were not defined below. The unique position Massachusetts has chosen to occupy with reference to sister State judgments of divorce strongly suggests that the claim of State interest has been adopted and altered to guise a claim of power based on purely political and long-discredited notions of States' rights.

In *ex parte* cases a State may conceivably have a legitimate interest in affording its non-participating domiciliaries an opportunity to be heard, particularly with reference to a status of the importance of marriage, and with reference to the incidents of marriage, such as support and custody of children. In an *ex parte* case, re-examination of a sister State judgment of divorce would be affording to the non-participating domiciliary an opportunity to be heard that may have been denied to such domiciliary even though the requirements of procedural due process had been complied with in the divorce granting State. Such opportunity may be denied by reason of the expense involved, the difficulty of transporting witnesses, etc. *Where, however, participation has taken place, the legitimate interest of the State of the forum is weakened and reaches the vanishing point where, as here, the litigant seeking col-*

lateral attack has had her full day in the Court of the divorce-granting State, in fact having secured the divorce. Since Massachusetts is not a direct party to these proceedings, no legitimate interest of Massachusetts is discernible which is served by permitting the respondent a second day in court to relitigate an issue heard and adjudged in Nevada under the circumstances here involved.

The fact that the respondent filed an answer with her cross-complaint in the Nevada Court admitting under oath the petitioner's jurisdictional allegations was a circumstance which impelled the Court below to characterize the Nevada proceedings as collusive, and to hold applicable the decision of *Andrews* v. *Andrews*, 188 U.S. 14 (R. 621, 622).

At the outset it should be noted that the issue of collusion was not raised by the pleadings in the instant case, and accordingly was not in issue. No evidence was offered on this point, and the only evidence having any bearing on this issue expressly negatives a conclusion of collusion. Without prearrangement, the respondent went to Nevada for the purpose of obtaining counsel to contest the petitioner's complaint of divorce, and to obtain a divorce herself. The Trial Court did not, in his report of material facts, report collusion as a factor in his findings.

The circumstances that the respondent admitted the allegations of jurisdiction did not require non-recognition of the Nevada judgment. Whatever may be the result in a case where collusion, as it has been defined in many cases (see Annotation, 109 A.L.R. 832), is expressly raised and is supported by testimony, the effect of the jurisdictional admissions in no way altered the requirements of the Nevada law requiring corroboration, and testimony both direct and by way of corroboration was offered in support of the jurisdictional allegations.* The conclusion reached

*Even Massachusetts local law does not require such corroboration. *Friedrich* v. *Friedrich*, 230 Mass. 59.

by the Court below lends emphasis to the position already taken that the Nevada judgment was not even accorded some faith and credit, but was considered presumptively invalid. That Nevada did not regard the proceedings as collusive is clear, else the Nevada Court would not have entered judgment. The disregard of the fact, by the Massachusetts Courts, that the Nevada judgment was entered on testimony and was not merely based on jurisdictional admissions was a disregard sharply criticized by this Court in *Harding* v. *Harding*, 198 U.S. 317, where it was stated, at page 332:

> "The assumption that the Illinois decree was a consent decree, merely registering an agreement of the parties, disregards the form of that decree, and cannot be indulged in without failing to give effect to the very face of the decree, which adjudged that the separation of the wife from the husband was without her fault. This was an express finding by the court, and one which the law required to be judicially made."

The case of *Andrews* v. *Andrews*, 188 U.S. 14, is not in point. That involved a dispute in Massachusetts between two persons claiming to be the lawful wife of the decedent, each requesting appointment as his administratrix. The second wife relied upon a divorce obtained by the husband and his subsequent marriage to her. The first wife maintained the divorce was invalid. The husband obtained his divorce by proceedings in South Dakota. He alleged his domicil in that State; his wife, after notice, appeared by counsel and answered, denying his domicil. The case was settled thereafter, and the wife by written agreement expressly consented to the granting of a divorce to her husband in the following terms (188 U.S. at page 17):

> "Fourth. Upon the execution of such papers, M. F. Dickinson, Jr., is authorized in my name to consent

to the granting of divorce for desertion in the South Dakota court."

Her appearance was later withdrawn. Immediately after he obtained the divorce, the husband returned to Massachusetts, where he lived until his death.

The only issue necessary to the determination of the *Andrews* case was the effect to be given to a divorce decree rendered upon the express consent of the parties (see *Tiedemann* v. *Tiedemann*, 158 N.Y.S. 851; aff'd 225 N.Y. 709). The authority of the *Andrews* case, on which this Court was divided, appears to be considerably shaken by the *Baldwin, Chicot County* and *Davis* cases, *supra*. See Strahorn, Jr., & Reiblich, The Haddock Case Overruled—the Future of Interstate Divorce, 7 Maryland Law Review, 29, 65. In any event, the expressions contained in the opinion of the *Andrews* case with reference to the effect of an appearance ought not to be wrested from their context, and should be confined to applicable situations where an appearance is filed for the purpose of securing a judgment rendered solely on the express consent of the parties. As so construed, the *Andrews* case is clearly distinguishable from this case, and is not in conflict with the contentions urged by the petitioner.* Although admittedly a spouse may not authorize the entry of a divorce decree as though it were an action on a judgment note, the evidence here does not warrant the conclusion that the judgment under consideration was founded upon express

*Since the instant case involved the physical presence of both parties before the Nevada Court, the effect of the mere filing of an appearance as *res judicata* is felt to be an issue not here directly involved. It is suggested, however, that it may well be that such a limited participation may not constitute a day in court, and that the States may properly decide under their local laws the effect to be given to such limited participation. This subject-matter is ably discussed in *Peri* v. *Groves*, 50 N.Y.S. (2d) 300.

consent of the parties. See, generally, Jacobs, Attack on Decrees of Divorce, 34 Michigan Law Review, 749, at page 803.

There exists another ground of distinction between the *Andrews* case and the present case, in that the parties to the divorce proceedings differed from those before the Massachusetts Court and this Court. There was not the privity between the parties in the *Andrews* case generally considered necessary for the application of *res judicata*. See Restatement, Judgments, sec. 79. The South Dakota divorce was an operative fact considered by this Court; but even had it been adversary, it may not have been conclusive on the jurisdictional facts decided or which might have been decided therein. Compare *Williams* v. *North Carolina*, 325 U.S. 226, 230. Hence, the *Davis, Chicot County* and similar cases may not have been applicable even if the teaching of those cases had been available to this Court when the *Andrews* case was decided.

By a curious process of inverse reasoning, the Court below felt constrained to disregard the effect claimed for the Nevada judgment on principles of estoppel despite the respondent's admission of the jurisdictional allegations. Like *res judicata*, principles of estoppel are founded on public policy. The virtual unanimity of authority in other States does not permit the successful party to collaterally attack a sister State divorce even where rendered *ex parte*.* Whatever this Court may decide as to the interstate validity of an *ex parte* divorce, where repudiation is

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**Elliott* v. *Wohlfrom*, 55 Cal. 384; *Ellis* v. *White*, 61 Iowa, 644; *Bledsoe* v. *Seaman*, 77 Kan. 679; *Judson* v. *Judson*, 171 Mich. 185; *Ferry* v. *Ferry*, 9 Wash. 239; *McIntyre* v. *McIntyre*, 211 N.C. 698; *Guggenheim* v. *Wahl*, 203 N.Y. 390; *Brown* v. *Brown*, 272 N.Y.S. 877; *Re Robottom*, 288 N.Y.S. 397; *Fisher* v. *Fisher*, 295 N.Y.S. 451; *Blume* v. *Blume*, 6 N.Y.S. (2d) 516; *Stevely* v. *Stevely*, 4 N.Y.S. (2d) 69; *Ferry* v. *Trop Laundry Co.*, 238 Fed. 867; *Re Ellis*, 55 Minn. 401; *Cope* v. *Cope*, 123 N.J. Eq. 190.

sought by the successful party, it would seem clear that where, as here, the respondent voluntarily admitted the petitioner's jurisdictional allegations, and was the successful party, fundamental principles of estoppel preclude her from relitigating the issue of domicil in Massachusetts. She would have been estopped to do so even directly in Nevada. *Calvert* v. *Calvert*, 122 Pac. (2d) 426. If, then, under the law of Nevada, the effect is to estop the respondent, a judgment so obtained is entitled to the same effect in Massachusetts under the full faith and credit clause. With reference to the application of principles of estoppel to judgments of divorce, it was said by this Court in *Bates* v. *Bodie*, 245 U.S. 520, at page 525:

> "The principle [of estoppel by judgment] would seem to have special application to a judgment for divorce and alimony."

See also *Laing* v. *Rigney*, 160 U.S. 531; and compare *Horowitz* v. *Horowitz*, 58 R.I. 396; *Curry* v. *Curry*, 79 F. (2d) 172; *Schacht* v. *Schacht*, 54 N.Y.S. (2d) 515.

The result of refusing to apply the principles of estoppel has led Massachusetts into the anomalous position of denying relief to a spouse who utilized his day in court in good faith in a sister State Court such as in the *Davis* case, but throwing wide the doors of its Courts to a spouse whose basis for collateral attack is predicated on the claim that he utilized his day in a sister State Court for the purpose of defrauding and deceiving the sister State Court into an assumption of jurisdiction. Such a result is not consonant with reason, policy or fundamental law, and is in conflict with the intention and purpose of the full faith and credit clause. Hitherto the considerations which had been deemed adequate to justify a relaxation of the full faith and credit clause to permit re-examination of sister

State judgments have been considerations of policy intended as a shield for the protection of the non-participating spouse. Those considerations are wholly without application to a situation where, as here, the party seeking repudiation of the Nevada proceeding for lack of jurisdiction had sought for and obtained relief in the Nevada Court on the ground that that Court did have the power to grant the relief prayed for.

The judgment here involved not only complied with procedural due process, but had the effect of finality with reference to the jurisdictional fact of domicil. It met with every test of justice and fair dealings. It therefore was valid in Nevada, and the effect claimed for it gave to it that interstate validity guaranteed under the full faith and credit clause. Its re-examination below was error.

II.

The Court below failed to give appropriate weight to the jurisdictional findings of the Nevada Court.

Apart from the question of disregard of fundamental law with respect to finality of jurisdictional issues, the cumbersome and involved record in this case acutely accentuates what is believed to be an unfortunate trend in Massachusetts to ignore fundamental standards of proof with respect to sister State divorces. As already indicated, while the directive of the full faith and credit clause has been relaxed in *ex parte* cases to permit a party defending against a foreign judgment to challenge the jurisdiction of the Court rendering that judgment, there are certain requirements to be met in doing so. The judgment relied upon by the party setting it up is entitled to full faith and credit unless and until the party seeking repudiation has met the burden of proving, by appropriate standards of proof, that the foreign Court did not have jurisdic-

tion to render it. "The burden of undermining the verity which the Nevada decree imports rests heavily upon the assailant." *Williams* v. *North Carolina*, 325 U.S. 226, 233-234. This principle was reaffirmed in the *Esenwein* case, 325 U.S. 279; cf. *Cheever* v. *Wilson*, 9 Wall. 108; and has been adopted and applied by the Courts of other States. *Davis* v. *Davis*, 162 Pac. (2d) 62 (Cal. 1945). *Herman* v. *Herman*, 57 N.Y.S. (2d) 614 (1945). *Re Schwartzapel's Estate*, 53 N.Y.S. (2d) 638 (1945).

In the instant case petitioner was deprived by the Court below of the criteria and standards of proof established by this Court for collaterally attacking a judgment based upon domicil. The Court below has persisted in the erroneous view stated earlier in *Bowditch* v. *Bowditch*, 314 Mass. 410, 415, 416, that "one who relies upon a foreign divorce must not only plead and prove it, but must also prove his bona fide domicil at the time the divorce relied upon was granted in the foreign State . . ." (See the first opinion below, R. 612.) Compare this view with that set forth in the second *Williams* case, quoted above. Neither the Trial Court nor the Court below gave the slightest deference to the Nevada decree. In fact, the burden of proving the validity of the Nevada decree was placed upon petitioner, who was not even given the slightest benefit of a presumption as to its validity. The Court below has, apparently, proceeded on the theory that, since it was a Nevada divorce, it was *ipso facto* invalid; this, despite the fact that uncontroverted evidence of Nevada law demonstrates that the divorce is valid in that State (R. 564-579).

The evidence as to petitioner's domicil, much of it uncontradicted, does not support a finding that the divorce was collusive or that petitioner was not domiciled in Nevada. This Court is not being asked to undertake to re-examine the subsidiary facts or re-try the case, but

merely to ascertain whether the respondent has complied with the standard of proof this Court has established.*

The issue of collusion was not before the Court below. It was not an issue raised by the pleadings, nor does the record disclose any contention by the respondent that the divorce was collusive. The Trial Judge did not report that the divorce was collusive, or indicate any circumstances warranting such a finding.

The complete legal history of these embattled parties, including some 625 pages of record in this case, reveals a bitterness and conflict which is completely at odds with the intimation of the Court below that the Nevada divorce became collusive in nature.

Petitioner went to Nevada from New York. Respondent testified that she had no knowledge of his presence there until she was personally served with notice of the Nevada proceeding. There had been no communication between the parties after the separation case in Massachusetts in March, 1942. Upon receipt of service, respondent consulted her local counsel as to a proper course of action. At her own expense, she then traveled to Nevada, in order, in her own words, "to seek counsel and to get a divorce . . . to defend myself against Mr. Coe's action for divorce" (R. 431). Such conduct on the part of respondent hardly indicates a friendly arrangement for divorce. Upon her arrival in Reno, respondent engaged an attorney recommended to her by the local Chamber of Commerce. Thereafter her attorney represented her throughout the Nevada proceeding. Respondent filed a demurrer and an answer on the merits to peti-

* "In a case where it is asserted that a person has been deprived by a State Court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made." *Craig* v. *Harney*, U.S. , decided May 19, 1947; 67 S. Ct. 1249.

tioner's complaint, and a cross-complaint for divorce. Thereafter a property settlement was arrived at, which exceeded, in amount, what the Massachusetts Court had awarded her in her support action. Upon her testimony as to petitioner's acts of cruelty towards her and petitioner's evidence as to his residence in Nevada, she obtained a divorce decree. The fact that the attorneys representing both parties managed to arrive at a property settlement hardly shows collusion. *Ham* v. *Twombly*, 181 Mass. 170, 173-174. If that were sufficient, many, if not most, of the divorces granted today would be invalid. There is absolutely nothing in the record to show that there was an agreement as to the divorce or any sort of arrangement between the parties with respect to it.* Indeed, the only affirmative evidence expressly excludes such finding. (See Deposition of Allan Bible, cross-interrogatory No. 15 (R. 568), and answer (R. 578).)

Turning to the issue of petitioner's domicil in Nevada, the evidence in support of the Nevada Court's finding is overwhelming, and subsequent events additionally support that finding. Petitioner testified that he intended to live in Nevada for reasons of health, since he suffered from severe asthma, and to get away from respondent; he was attracted by the liberal tax laws of Nevada also. He stated that he intended, while living in Nevada, to obtain a divorce relying upon a cause which occurred in New York after the March 25, 1942, decree in Massachusetts, intending to live in Nevada whether he obtained a divorce or not. Petitioner was physically present in Nevada, and his intention to make it his home concurred with his presence. He had no ties or connections with his former home in Worcester, other than some real estate which he owned

*The Nevada Court entered judgment with complete awareness of the pleadings and the property settlement agreement.

there and visited occasionally. At the time petitioner left for Nevada he was living in New York in an apartment he had rented in October, 1940. Petitioner did not work in Worcester or elsewhere, since his wealth was largely inherited and was maintained in the form of securities. Thus, when petitioner arrived in Nevada, he had no close ties to Massachusetts; most of his more important connections had been in New York. In Nevada petitioner lived at a ranch house; maintained a car which he registered in Nevada; took out a driver's license; opened a bank account and rented a safe-deposit box, all of which reflect his ties to his new domicil. Moreover, petitioner did not live in Nevada merely the minimum period of six weeks, obtain his divorce, and then depart quickly. Instead, he remained over three months. He married his former secretary in Nevada when respondent obtained her divorce. Petitioner and his present wife then traveled to New York, where petitioner vacated his apartment. They then went to Worcester temporarily while petitioner completed the winding up of his affairs there. He sold his former house and rented out another property he owned. Thereafter petitioner and his wife returned to Nevada to live.* He entered into negotiations to buy a house to live in with his present wife, and to purchase and operate the ranch at which he had previously resided. Petitioner's subsequent return to Nevada is significant. This latter return, while not, of course, before the Nevada Court, was presented to the Trial Court below, and throws striking light on the nature of petitioner's earlier intentions with respect to his Nevada domicil. Petitioner and his wife returned to Worcester, Massachusetts, in August, 1943, only upon advice of Nevada counsel, in order to defend the present suit which

*The testimony with reference to domicil was much stronger before the Massachusetts Court than it was before the Nevada Court.

had been commenced by respondent. They have since lived there for the same reason.

In the face of the above evidence, and despite an express finding of petitioner's domicil by the Nevada Court, the Trial Court held that petitioner still retained his Massachusetts domicil, and this finding was sustained on appeal. An examination of the record shows that the Trial Judge was determined to hold the Nevada divorce invalid, regardless of the evidence or the weight of the evidence.*

*No attempt will be made to discuss the highly extraordinary circumstances under which the Trial Judge was substituted for the original judge who heard this case (R. 29-32), nor the collateral issues deemed material on the question of domicil. Highly illuminating as regards a judicial attitude toward Nevada divorces are the characterizations of the petitioner's contentions as "foolish" (R. 551); the Trial Judge's self-instruction that he had a right "to make inquiries from persons whether they have certain knowledge that might affect the conduct of a trial or the conduct of a person in the courtroom, if he sees fit" (R. 187); his refusal to allow general exceptions and expedite trial because petitioner's counsel were not "entitled to it" (R. 344), or because petitioner's counsel "may have some trouble in determining where to draw the line" (R. 386-387). The Trial Judge's concept of domicil may be ascertained by reference to his report of material facts, in which the factors he considered as material were nothing more than a disbelief of testimony, which in turn were predicated on the presence in the courtroom of an excitable spectator, and the mistaken and corrected testimony of the petitioner in February of 1945 as to when he made a certain visit in 1942. Whatever lip service may have been accorded to the concept and application of the issue of domicil, the record in this case makes prophetic the language in *Waldo* v. *Waldo*, 52 Mich. 94, where it was said with reference to domicil:

"The final result with all its important consequences might come at last to depend upon the idiosyncrasies or acquired peculiarities of the triers."

The attitude, view, concepts and findings of the Trial Judge with reference to the issue of domicil were adopted and affirmed by the Court below. While the Court below has recognized that "A day or an hour, it has been said, will suffice for the acquisition of a domicil" (*Winans* v. *Winans*, 205 Mass. 388, 391), yet, in apply-

Since the evidence did not support his findings, he chose the convenient device of "disbelieving" it. He magnified trivial inconsistencies in petitioner's testimony, readily explainable by reason of the fact that petitioner is quite deaf. An example of the reckless findings of fact made by the Trial Court is one to the effect that the Nevada Court did not have jurisdiction over the persons of the parties (R. 50). Not only was such a finding completely erroneous, but it was clearly an attempt to convert a constitutional claim into a finding of fact in order to thwart review by this Court. See *Williams* v. *North Carolina*, 325 U.S. 226, 236. It reveals the attitude, adopted by both the Trial and Appellate Courts, toward Nevada divorces. The Trial Court made many similar findings in its effort to avoid review here. Most such findings were affirmed. On a record and findings such as these, for this Court to accept the facts found by the Courts below at their face value is to deny to petitioner a remedy for one of the basic evils which the full faith and credit clause was designed to correct.

III.

Even if neither party was domiciled in Nevada, and the question of domicil was properly open in Massachusetts, the part of the Nevada decree dealing with support and property rights is entitled to recognition in Massachusetts.

The Nevada judgment at the instance of respondent dealt with the question of support and the property rights of the parties. The decree of the Court approved and

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ing the rule to extra-state divorces, a trial judge's finding of acquisition of a Nevada domicil was held to be plainly wrong, despite an absence from this Commonwealth of over two years. *Rubinstein* v. *Rubinstein*, 319 Mass. 568. The trend of the law in Massachusetts had been profoundly influenced by *Smith* v. *Smith*, 13 Gray, 209, discussed *infra*.

adopted a contract entered into by the parties finally settling those issues. The Court has personal jurisdiction over both parties. Therefore it had the power to enter a valid personal judgment. *Pennoyer* v. *Neff*, 95 U.S. 714. The distinction between the jurisdiction of a State to grant a divorce and to affect property rights in so far as the full faith and credit clause is concerned was recognized in *Williams* v. *North Carolina*, 317 U.S. 287, 293, note 4, but the fact that a distinction between the termination of the marital status and the disposition of support and property rights was made at all is significant. Prior to that case, it was generally thought that a valid divorce finally disposed of all aspects of the marital relationship, but the problem of the "separable" divorce when granted *ex parte* has now arisen. Thus, it may be that there are different jurisdictional requirements, under the full faith and credit clause, for a State to grant a divorce and finally to determine support and property rights. For a divorce entitled to recognition under the full faith and credit clause, the domicil of at least one party is necessary, but, for recognition of a decree dealing with support and property rights, only personal jurisdiction over the parties should be required as with any money judgment. See, generally, Husserl, Some Reflections on Williams v. North Carolina (1946), 32 Virginia Law Review, 555, 566-567; Bingham, Song of Sixpence (1943), 29 Cornell Law Quarterly, 1, 14; Strahorn, Jr., & Reiblich, The Haddock Case Overruled, 7 Maryland Law Review, 29, 60; Taintor, Is Haddock Dead? (1943), 15 Miss. L.J. 165, 186-187.

Support proceedings and the like need not accompany an action for divorce, since there are independent causes of action. *Bray* v. *Landergren*, 161 Va. 699. *Williamson* v. *Williamson*, 183 Ky. 435. Thus a number of States now recognize an *ex parte* foreign divorce obtained by a spouse at a new domicil except as to the support and property

incidents of the foreign decree. *Price* v. *Ruggles*, 244 Wis. 187. *Proctor* v. *Proctor*, 215 Ill. 275. Cf. *Norris* v. *Norris*, 200 Minn. 246.

In *Esenwein* v. *Commonwealth, ex rel. Esenwein*, 325 U.S. 279, Justice Douglas in his opinion pointed out the basic difference between jurisdiction to grant a divorce and jurisdiction to deal with support, in so far as the full faith and credit clause is concerned, saying, at page 282:

> "In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. See *Yarborough* v. *Yarborough*, 290 U. S. 202; *Davis* v. *Davis*, 305 U. S. 32. But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. See *Pennoyer* v. *Neff*, 95 U. S. 714. . . ."

In the instant case there was admittedly jurisdiction over the persons of the parties in Nevada. A decree was finally entered disposing of support and property rights. Therefore the portion of the decree dealing with such matters is entitled to full faith and credit in Massachusetts, regardless of the local policy of that State. Cf. *Yarborough* v. *Yarborough*, 290 U.S. 202; *Fauntleroy* v. *Lum*, 210 U.S. 230; *Christmas* v. *Russell*, 5 Wall. 290.

To superimpose upon the present requirement of personal jurisdiction a rule that no State but that of the domicil of a spouse may have jurisdiction for the purpose of the full faith and credit clause to deal with support and property rights would make such actions local in charac-

ter, and would impose needless hardship in cases where personal service cannot be obtained at either domicil.

The Court below completely ignored this question, although it was pressed by petitioner. Thus, in the instant case, the Nevada judgment, made with both parties before the Court, having finally determined questions of support and property, is held void, thereby depriving petitioner of the benefits of the Nevada judgment which finally disposed of such issues. Cf. *Yarborough* v. *Yarborough*, *supra*.

IV.

Massachusetts G.L. (Ter. Ed.) c. 208, sec. 39, as applied in this case, deprives petitioner of rights guaranteed him by the full faith and credit clause.

The application of the provision of G.L. c. 208, sec. 39, has added much confusion to the ill-defined concept of public policy in Massachusetts divorce law. Massachusetts has attempted to justify by legislative enactment what it could not have done by justifiable decision under the full faith and credit clause.*

The first clause of Massachusetts G.L. (Ter. Ed.) c. 208, sec. 39, conforms substantially with the requirements of

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*Some explanation for the unusual attitude for the Court below may be found in the historical background of this statute. The earliest legislation of the Commonwealth, indicating its policy towards foreign divorce, was first enacted on May 1, 1836. Rev. St. c. 76, sec. 39, declared that—

"When any inhabitant of this state shall go into any other state or country, in order to obtain a divorce for any cause, which had occurred here, and whilst the parties resided here, or for any cause, which would not authorize a divorce, by the laws of this state, a divorce so obtained shall be of no force or effect in this state."

Section 40 of this statute provided that "In all other cases, a divorce decreed, in any other state or country, according to the law of the place, by a court having jurisdiction of the cause and of

the full faith and credit clause, except for the provision that the foreign Court must have jurisdiction over both parties as well as the cause. But cf. *Williams* v. *North Carolina*, 317 U.S. 287. But the second clause of the statute, particularly as applied to this case, purports to create an unconstitutional exception to the clause. The statute provides that, if an inhabitant of Massachusetts goes into another State to obtain a divorce for a cause occurring while he was in Massachusetts or for a cause not authorized under Massachusetts law, a divorce so obtained is void in Massachusetts. Thus, suppose H. separates from

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both the parties, shall be valid and effectual in this state." See *Lyon* v. *Lyon*, 2 Gray, 367, 369.

It is obvious that this legislation would today be considered unconstitutional. Section 39 did not purport to deal with any jurisdictional issues. If the divorce escaped the prohibition of section 39, issues of jurisdiction would then arise under section 40. But if the divorce was determined within the scope of section 39, it would be void if the judgment complied with all the jurisdictional requirements of section 40. This statute was construed and applied in the case of *Smith* v. *Smith*, 13 Gray, 209. In that case an Indiana divorce was held void as violating the statute despite the fact that the only evidence before the Massachusetts Court was the Indiana record. Instead of according the Indiana record the credit it was entitled to, the Massachusetts Court inferred that the fact of obtaining the divorce in Indiana created a "violent presumption" that that was one of the prohibited purposes and the statute was therefore applicable. The jurisdictional issues were not discussed in the *Smith* case.

The provisions of the revised statutes above cited were re-enacted without change by G.S. c. 107, secs. 54, 55.

The statutory policy of Massachusetts in its present form was declared in R.L. c. 152, sec. 35, and may be found in G.L. (Ter. Ed.) c. 208, sec. 39. Not one case dealing with the subject-matter herein involved has noted any change in the legislative policy of this Commonwealth. The law declared and applied in the *Smith* case has been perpetuated since, despite the legislative reversal of that case and despite the legislative intention to conform to changing trends and concepts, by emphasis on jurisdiction and the compulsion required by the full faith and credit clause as being also a matter of policy.

his wife, W., and moves to Nevada, where he makes his new home. W. is an "inhabitant" of Massachusetts. H. files a suit for divorce in Nevada, serving W. in Massachusetts. W. thereupon comes to Nevada, contests H.'s divorce, files a cross-complaint based on a cause occurring in Massachusetts, or not authorized by Massachusetts law, and, after the divorce is granted, returns to her home in Massachusetts. Under this statute, W.'s divorce is void in that State even though the Nevada Court had jurisdiction over the subject-matter by reason of the domicil in Nevada of H. The hypothetical case given above approximates the present facts. It is not unusual for a divorce to be granted upon the cross-complaint of a spouse not domiciled in the State. See *Cole* v. *Cole, supra.*

Nevada statutes expressly permit such procedure. Nevada Compiled Laws, 1929, sec. 9460, as amended (R. 573, 578). All jurisdictional requirements are met and under the first *Williams* case the divorce is entitled to recognition in all States. But the Massachusetts statute nevertheless purports to make the divorce void in that State. It seeks to impose the local divorce policy of Massachusetts on other States regardless of the jurisdiction of such other States to grant a valid divorce decree. This Massachusetts may not do under article IV, section 1, of the Constitution. *Christmas* v. *Russell*, 5 Wall. 290. *Fauntleroy* v. *Lum*, 210 U.S. 230. In the *Christmas* case the State of Mississippi sought to bar actions on foreign judgments if the original cause upon which the judgment was based was barred by the local statute of limitations and if the defendant was a resident of Mississippi at the time the original action was commenced. Suit was brought upon a Kentucky judgment which was within the statute. The Court held that statute invalid, saying (at page 301):

> "Instead of being a statute of limitations in any sense known to the law, the provision, in legal effect,

is but an attempt to give operation to the statute of limitations of that State in all the other States of the Union by denying the efficacy of any judgment recovered in another State against a citizen of Mississippi for any cause of action which was barred in her tribunals under that law."

In the *Fauntleroy* case, too, a judgment was procured in Missouri on a cause of action which was not enforceable in Mississippi, where the cause of action accrued. This Court nevertheless held that Mississippi was bound to recognize the Missouri judgment since it was binding in the State which rendered it, even though it could not have been obtained originally in Mississippi.

In the present case the Massachusetts Court seeks to accomplish by means of the statute what Mississippi was not permitted to do in the above case, namely, disregard a valid judgment in order to promote local divorce policies.

In *Andrews* v. *Andrews, supra,* the same statute was involved and on the facts there presented its validity was sustained. It has been pointed out in the discussion of the *Andrews* case, above, that the facts in the *Andrews* case are clearly distinguishable and principles of *res judicata* were inapplicable. Cf. *Williams* v. *North Carolina,* 325 U.S. 226; *Davis* v. *Davis, supra; Chicot County* v. *Baxter State Bank, supra.* The result in that case would have been the same without the statute. In the present case the judgment involved did not merely register an agreement of the parties. Moreover, the Massachusetts statute makes no allowance for the operation of the principle of *res judicata* as to questions of jurisdiction, as seen in the instant case and in *Davis* v. *Davis, supra.*

Here, then, the Massachusetts statute is applied to the Nevada judgment in complete disregard of the fact that the judgment is conclusive both with respect to the merits and

with respect to the domicil of petitioner. Such an application completely disregards the rights secured to petitioner by article IV, section 1, of the Constitution.

Conclusion.

Time-tested, established and recognized principles of law gave to the Nevada judgment the effect of finality with reference both to the divorce and to the property settlement. The considerations present in *ex parte* judgments of divorce which have been held to justify re-examination of sister State judgments as a limitation of the full faith and credit clause are not applicable to the facts at bar.

An extension of the limitation permitted in *ex parte* cases to embrace the facts in this case not only would result in further departure from the Constitution and settled principles of law, but would for all practical purposes make ineffective the full faith and credit clause and defeat the purpose of uniformity it was designed to accomplish.

Unless the judgment below is reversed, foreign judgments will be subject to uncertainties even greater than those which led this Court to overrule *Haddock* v. *Haddock*, 201 U.S. 562. Particularly with reference to divorce it is highly desirable that greater certainty and stability be achieved than more uncertainty, confusion and hardship. In order to achieve that certainty and stability and in order to obtain a return to the Constitution, it is urged that the judgment below should be reversed.

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